

BOARD OF ZONING APPEALS

Minutes

November 27, 2001

The regular meeting of the Board of Zoning Appeals of the City of Wichita, Kansas, was held at 3:00 p.m., on November 27, 2001, in the Planning Department Conference Room, Tenth Floor of City Hall, 455 N. Main, Wichita, Kansas.

The following Board members were in attendance: JOHN ROGERS, BICKLEY FOSTER, JAMES RUANE, FLOYD PITTS, JAMES SKELTON, RANDY PHILLIPS, present. BRADLEY TIDEMANN, absent.

The following Planning Department staff members were present:
DALE MILLER, Secretary, SCOTT KNEBEL Assistant Secretary,
ROSE M. SIMMERING, Recording Secretary.

Also present: Sharon Dickgrafe – Assistant City Attorney.

Also present: J. R. COX – Commercial Plan Review/Commercial Zoning --
Office of Central Inspection.

RUANE: Calls BZA meeting to order. I am going to ask the Secretary to call the role, please.

SIMMERING: Completes role call.

RUANE: Turning to the Agenda first we have approve of BZA meeting minutes for October 29, 2001. Are there any changes, modifications or corrections desired? Yes, Mr. Foster?

FOSTER: On page 15, it notes the motion and the second and indicates the vote was 4-2 but it doesn't indicate who voted. I believe our bylaws would call when we have a divided vote to indicate who made the vote.

MILLER: We can listen to the tape and pick-up the two people or go back to the records and figure out who voted which way.

FOSTER: Don't we usually put that in whenever we have a divided vote? I think we put in the names of what the vote is.

MILLER: Typically.

RUANE: I think that would be a good change.

PITTS: Actually Mr. Chairman, where it says motion carries to rehear the case 4-2, that actually was not done as I recall. Because when we left here we didn't absolutely know that we were going to rehear this case or that we had to.

RUANE: I understand your question. We had to make a preliminary finding as to whether or not the submittal was different enough to merit our entertaining this item again. On this vote and this motion, we did decide to rehear this, which is why we may be rehearing it for sometime to come.

SIMMERING: The motion on page 15....

PITTS: We didn't actually ever say that we were going to rehear it because we were of the opinion that we would not even be meeting today when we left here, and that is in the minutes.

RUANE: I will leave it to somebody else to try and describe that. If you read on you will see where we got to the outcome where it resulted in a moot vote. But it was a motion early on as to whether or not we were going to rehear Dick's application at all. If this vote had not been 4-2 then the Dick's sign application would have been over and done with at our last meeting.

PITTS: I apologize. I am way out of order. I was speaking of the rehearing that we are doing today. If that is not what this discussion is pertaining to, I am out of order, and I apologize.

RUANE: That's ok.

SIMMERING: My notes indicate that on page 15, TIDEMANN, PITTS, SKELTON, RUANE vote 4 in favor of hearing the case. Opposed Vote 2 were ROGERS, AND FOSTER.

PHILLIPS: With one abstention.

SIMMERING: Correct, with one abstention.

FOSTER moves PHILLIPS seconds to approve the meeting minutes of October 29, 2001, with that change.

MOTION CARRIES 6-0.

RUANE: Turning to Item #2, Case No. BZA2001-00050, Dick's Sporting Goods, variance to increase maximum height of a building sign from 30 feet to 38

feet 6 inches on property zoned "LC" Limited Commercial.

PHILLIPS: At this time, I need to reestablish that I will be abstaining on this Item. I will step down from the Board until this case is dealt with.

RUANE: Let's do a little housekeeping first. Note that each of the members of this Board have received two pages with regard to Item No. 2. First is a one page memo from David Babich, who is in the audience supporting his request to deny the request. Second is a reiteration by Golf Discount of Wichita of their objection to the variance request. Does each of you have those, and have you had the opportunity to review those in connection with this request? Anybody in the audience that would like a copy of these or would like to review these that hasn't seen them can have my copy now if you would like.

KNEBEL: There should be some on the table.

RUANE: I would like to make sure that everybody has the same record in front of him or her. Ok, here is where we are on this Item. On October 29, 2001 we had a tie vote of 3-3, which is a moot vote both to approve and to deny this request. Our bylaws require it takes a vote of 4 in favor of any action in order for that variance to be approved. We have one fewer member then we did on October 29th so it makes things a little bit more difficult, but our bylaws were what they were on the date when this application was filed, and we need to follow through with those. The staff has submitted what I believe is the same staff report, is that correct?

KNEBEL: That is correct. There is no additional information, other than the two memos that you mentioned, provided either by staff or the applicant.

RUANE: Has there been any change or discussion in the application itself or any concessions?

KNEBEL: No there has not.

RUANE: Does the applicant have anything that they would like to add?

CHRISTIAN ABLAH, CLASSIC REAL ESTATE, 8200 E 32nd STREET N., WICHITA, KS 67226: Yes.

RUANE: Great, please come forward.

ABLAH: This was a study that I thought I presented to staff the last time and if you remember it was not in the packet. So this is basically the...

PITTS: Mr. Chairman, point of order. Do you really believe that it is appropriate for us to hear additional information from the applicant or the opposition?

RUANE: I don't know. Ultimately we have to make a decision on this. I think to receive additional information, or perhaps an amendment to the application, or a change to staff's position is about the only way that we are going to get there.

DICKGRAFE: I don't think that it would be appropriate to deny the applicant their right to have a hearing on this issue. I understand that we have heard this before but I think the Chair is correct that at some point the Board needs to reach a decision. It will keep coming back and the applicant has the right to prosecute their appeal, and the Board should allow him the right within the limitations currently in the bylaws to do that.

PITTS: Thank you.

ABLAH: I appreciate that, and I will make my comments extremely brief. But this is what was supposed to be put in the packet that basically gives about eight different angles at the 38 feet. I think if you remember I was pretty flustered last time, and the time before that, and maybe a third time is a charm. I have no idea, but with the fact that this information had not been given to you.

I would just make a quick comment that I mentioned to you all at the last meeting that I had a meeting the next day with Dick's Sporting Goods people in Chicago. We had that meeting, and they had basically said that, particularly to this site, that it is 38 feet 6 inches is what they would like for this to happen. We have had a lot of different deal points back and forth, and this is really the last hurdle. If this is something that is approved, then this customer, who has five stores in Kansas City and one in Topeka, who does, and just for the record, just to briefly mention that they do about approximately 10 million dollars in volume in their stores. They would like to be here, and we are, as I said in the past, "a dot on the map" in the retailers eyes. They want to go where they can get what they want.

I will be available. I have heard from some of you. I haven't heard from all of you. I have refrained from calling anybody this time. Kind of towards what Mr. Pitts has said, you guys have a decision to make. I am happy to answer questions, and I am available for any questions, and would love to talk as long as you want or as short as necessary, and I know that everybody is busy, and I don't want to be anymore repetitive then I already have, but I am available for questions.

RUANE: Any questions for the applicant? Anyone in the audience to speak in favor of or against the applicant's request for the variance?

DAVID BABICH, 4431 IRONWOOD, WICHITA, KS 67226: I am here to ask you to deny the request to the variance. I have given you this handout the reasons why, so I am not going to amplify on that, because you had it ahead of time. But, on the margin, I can't imagine a business being successful if he has a 38 foot sign, and he is not going to be successful, or I mean that he will flourish, if he has a 38 foot 6 feet sign. It just doesn't matter.

The other thing that I have seen in the minutes is the request that we have visibility from K-96, and that does not seem reasonable to me. The nature of a "big box" from the marketing standpoint, I would think, would be that it is a destination point. They put them in the back of smaller operations, so that when you are going to get your trampoline, your basketball goal, you have a destination in mind. So this idea that we have to have that much visibility from K-96, when it has a Rock Road address, doesn't hold water.

If I was to give you direction how to get there, I would tell you to get off the K-96 ramp, turn right on Rock Road and stop at the first stop sign, not today but that will be helpful to them also in the future. It is planned for there to be a stop sign at 32nd and Rock Road that will accommodate the applicant, and then turn left, and you will be in front of Dick's Sporting Goods.

I really hope, and I have been to this store in Kansas City, and both of those stores that I have visited in Independence and Olathe, the one in Independence had the sign about half way down the building, and the one in Olathe was nearly all the way down on the building. So I am hopeful that the applicant, and the people who speak for the applicant, can sell this vendor on locating in Wichita, and not consider us as a "spec on the map", rather than trying to sell us on Dick's. So I thank you, and if you have any questions I will try and answer them.

RUANE: Any questions for Mr. Babich? Anyone else who desires to be heard?

ABLAH: I might like to say one more thing, if I may. You guys have a decision to make. Like I say, I have heard from some of you. I haven't from all of you. I respect and appreciate his comments and what others have been made in the past.

These retailers are doing 12 stores. I think I mentioned that to you before, that they are doing 12 stores this year. That is it. They are going to do, what they wish to do and whether we like it or not, we are a "spec on the map" in these retailer's minds. That may be a poor description. Maybe that is not quite fair. Maybe that is not quite right, but it is what it is. It is a large country, and we have an economy. We have a 50,000 square foot tenant, who desires to be here, who looks me right in the eye and says, "We are not going if we don't get what we want." Now maybe there is a way to negotiate that. I don't know. If you want to talk about something, but they went from 43 down to 38 feet, and I know

everybody knows the history. I would just love to see this tenant be able to come to Wichita and be here and would really appreciate the support if you all can see it in your minds to think that a few feet doesn't stop a 125-store, privately-held chain to come to this market. Because we are a "dot on the map," as much as I hate to say that.

I love this community. I push it. I do everything I can for it, and they are not coming to this site if they can't get that, and that has been just that clear. I was going to walk away. When I had another chance, another opportunity, and here we are again. I hope the Board, and you all can ask questions, and can do whatever you can do to grant a variance. That is what variances are for, in my opinion.

FOSTER: Mr. Chairman, may I ask Mr. Ablah a question?

RUANE: Yes, please do.

FOSTER: Mr. Ablah, the few minutes have given me a chance to look over your drawings and so forth is why I have a question. I hope you will frankly tell me whether, if I am wrong let me know. I have looked at each one of these A through H, and I don't see that it would make a bit of difference whether it was 30 or 38 feet. I don't see anything here that shows that it would be visible at 38 that it wouldn't be visible at 30 feet. Now, be frank with me, I really don't see that. I went through each one of them, and when you can't see it, there is a building in front, and it wouldn't make any difference whether it is 38 or 30 feet. This is very helpful to me, but I am not sure that it helped you, is my point.

ABLAH: I think if you look at letters, B, H, and F. Let's start with "H". Let's go to the last one first. "H" you can start to see their sign there. I am no expert on this, and I didn't prepare this. I am giving you what IKON specialist, what they were asked to do with George Lay Signs, but if you look at "H" you can see where that is somewhat more visible. Would you agree with that, or disagree?

FOSTER: You mentioned "B". Let's look at that.

ABLAH: Let's start with "H", if we could.

FOSTER: "H"?

ABLAH: Yes, "H". The last one.

FOSTER: Okay, let's go "H". That was the one that I looked at a little closer than others, and if it was lower down, I presume a person would still see the edge of it. But I would hate to base a zoning case on one view that might be observed

for maybe like two seconds.

RUANE: Let's make that a question Bickley.

ABLAH: In "E", if you look at "E", with the tree shrubs there, that I think makes a difference. Even if you look at any of these, you say what is the difference? Let's take "C" for example. Higher is better. More is better, not in the staff's mind and maybe not in others, but in the retailers mind, to make their decision to come here, quite honestly it is. I am just the go between guy trying to bring something to our community. Whether that is the right thing to say or the wrong thing to say, I don't know, but that is my opinion, and I am entitled that as the applicant. You are entitled to do what you want to do. These guys are going to do what they want to do, Mr. Foster.

FOSTER: You raised the questions on "E". The sign itself is what size? North, South?

ABLAH: I am sorry.

FOSTER: The height of the actual sign itself.

ABLAH: The height of the letters they conceded to 8 feet as opposed to what they can do at 9 feet. Not a huge concession but it is a concession.

FOSTER: But, if you look at letter "E" and assume that the word "Dick" is 8 feet, you could easily see, even with the trees there, that you could lower it down 8 feet or more and still be able to see it even under these circumstances.

ABLAH: Not as well. That is what I am saying...

FOSTER: You can even measure it here and see that ...

ABLAH: I would propose the question to staff. You guys are to make a very big decision here. Excuse me. The BZA is something that I know that staff has their opinion and they feel the way that they do. I know that the applicant has their opinion. You guys have a difficult situation, and I am just trying to layout the facts as I see them as what a tenant that wants to be in here that is going to do approximately, if they are successful, like they could, approximately 10 million dollar store with increased taxes. I have been told to be careful about saying that. I am just trying to lay it all out on the line. There is nothing here other than what you guys have a lot of power on something.

I talked with Marvin, and I mentioned this the last time. You know we could go through the "spot zoning". We don't want to do that, and I asked what is

appropriate to try and accomplish what we want to accomplish? Go back to through this way. That is what we are trying to do.

When we went in front of the DAB, which I believe, Dave Babich, I believe, Chair that, we were successful to that on an 11-1 vote. I campaigned. I worked. I talked. I did everything that we could humanly do, and got an 11-1 vote there. I talked to almost everyone of them. I know that wasn't something that you thought was a positive thing. I realize that has no impact. I know that the decision today decides whether or not this happens or not. I am just telling you, "Christian, go convince these guys to come here." They are going to come here. They are going to do this. This is a great City. Others have lived with this. I understand this. I have worked with this client for 4 years. Four years trying to get these guys to come to this community. Again, I am just telling you that we are a "dot on the map", and you guys have the power to say yes, or the power to say no.

That is what a variance is about. Here we are a third time. Unfortunately, one of the people that voted for me the last time is not here. That is extremely unfortunate. Maybe there is a reason for that. I don't know. It is what it is. Life goes on. I have lived in this community for a long time and plan to be here for a long time, and plan to try and bring what I think are important tenants to here, when they have desires. I don't think we are talking about a screened in area with outside storage that is "Oh my Gosh this is so big". What are we talking about here? We are talking about the height of a sign. That is what we are talking about, and this is something that we are going to say, "I just can't see it". We can sit here and argue about this and that, and maybe it is not that big of a deal to you, but it is to the tenant if they are going to come here. That is what I really want to try to drive home and ask for your support today.

RUANE: Bickley, were your questions answered?

FOSTER: Yes, Thank you.

RUANE: My question is, and maybe I should have picked this up earlier, but when the DAB considered this, they voted 11-1 in favor of the variance?

ABLAH: David, unfortunately, was the one that said "No", and is the Chair, but 11 of those on that Board said yes. If they all understood, I sat down one on one with half of them. But, to answer your question, yes it was 11-1 in favor of the variance. Is that correct?

RUANE: I will let David comment on that.

BABICH: The District Advisory Board II met twice on this subject, and the first time it was unanimous to take the staff's recommendation and deny the

application. The applicant was not at that meeting. Then it was brought up again, and Mr. Ablah visited with many of us. I was very impressed with him as a person, and I think, and wish him the best in his career, because I think he is going to help all of us in Wichita. He has tried to present this on an individual basis, how we can relate to it, answer any questions.

But, when it came back a second time and he made the presentation, and I didn't want to come here to speak for the District Advisory Board, so this is subjective. I thought the reasons that were advanced at that meeting by the applicant were #1) It is going to save jobs in an environment where we are losing jobs, and #2) If we didn't do this that they was going to go because Wichita is but a "spec on the map". The argument on was who is the "Specee" and who is the "Specor" as far as I am concerned, but that was the position of the Board, and I am not speaking for the Board.

FOSTER: Mr. Babich, were the drawings that you are aware of that we have today, were they shown to the Board?

BABICH: No, not those drawings. There was an earlier set of drawings that were more related to the sign as opposed to the different angles. No they were not, to answer your question.

FOSTER: Thank you.

RUANE: That exhausts the input from other than us. We gave ourselves a pretty tough job on the 29th of last month when we determined that the new submittal was different enough, that it deserved to be heard, and then deserved a decision, and it does deserve a decision. I give everybody the opportunity to speak their mind and explain what if anything has changed.

Although this doesn't relate directly to the "spec on the map", I do think that it is unfortunate when any item like this gets bogged down in the process. Especially when you are dealing with an attitude of a developer, or a concern, and they see how long it takes for a decision to be made by a community such as ours. I always think that the longer you take, the worst it makes our community look. So I regret the speed with which this decision is being made. But, there may or may not be anything that we can do about that. Does anybody have any comments on the application itself?

FOSTER: Mr. Chairman, just in regard to the comments just made. We made a decision in the regular time in the very beginning. This was voted on. A decision was made, and the applicant reapplied, so I don't think any apologies are needed. I think this has been handled in the proper manner, all the timing and everything. I think our problem was that is just the way that it came out. It is too bad, but I

don't know that we have any apology to anybody that is necessary about the time that it took to do this. The applicant reapplied. We don't have anything to do with that.

RUANE: Any other discussion or motion to be made?

FOSTER: Is the Board deliberating now. Is that where we are Mr. Chairman? Have you closed the hearing?

RUANE: I don't think we can really begin deliberating until we get a motion.

DICKGRAFE: I think you need to confine your discussion, or limit your discussion, to the Board if all the public comments have been taken.

RUANE: I believe that we are there.

FOSTER: Mr. Chairman, first of all I do appreciate Mr. Babich in being here. He and I are both on a District Advisory Board, so I know what it is like. I think we have to not to take into account at all what the District Advisory Board did. They presumably may have had a different presentation made to them. It is not the same that you have heard here. We have heard from our lawyer here that the District Advisory Board is not suppose to be making decisions on zoning cases, and in fact, in the future, I think we ought to have a rule that we should not receive these, and it just confuses the issue, it seems to me. They were not hearing it, obviously, on the same plane that we have to hear it in terms of the five conditions and all that. So I would say that we are not here to take that into account what the District Advisory Board did.

I do appreciate the drawings that were submitted, and just frankly, if I had this last time, it would have been the same thing. If you are driving by in a car on Rock Road, you can't see this unless it is 73 feet high. If you look at everyone of these, I think you would find that you could see them at all of the positions whether it is 30 feet or 38 feet if you visually lower each of these about 8 or 9 feet. Everyone of these, I would contend, can be seen from a 30 foot height in between the buildings, and that was a point that I was trying to make last time, but I didn't have a document in front of me. But, I was making the point that I felt that was true, and I think this document said.

I suppose that I think that the concern that we have is that the BZA is a creature of precedent. I would like to ask the staff, Mr. Chairman, I wasn't on the BZA for 1 ½ years. Something may have happened. But am I under the impression that no one has ever received an approval on Rock Road in this area for the back area for a higher sign.

KNEBEL: Yes, that is accurate.

FOSTER: I see no reason to break that. I think this is a self-created hardship, and that is what we are not supposed to be approving. Someone went out and bought something in back. They don't enjoy the same rights as the people that paid for the frontage. We have got the largest company in the world that makes 140 billion dollars in sales a year that has a smaller sign than that is being requested here that is right down the line. There is nothing that I see that would be gained.

I am not even sure that hasn't been discussed today whether it could be seen from a fractional of a second being on the ramps leading off the K-96 coming down to Rock Road. We haven't really dealt on that in all of our cases. That would make it worth while to do it. If you are prepared, I feel that the same motion should be made to turn it down based on all of those factors Mr. Chairman.

PITTS: I have gone through the five findings of fact that Mr. Skelton mentioned on our last meeting, and at that time, I was very much concerned that we followed our own guidelines in findings of fact. I believe in these today just as much as I did a month ago. I think the findings of facts for the granting of the variance do exist, and I should think that I am going to vote in favor of granting the variance.

SKELTON: It can also be noted that when certain businesses may or may be at a disadvantage in certain sectors in the economy, the government does play a role in providing incentives. I think as long as the law will allow us to grant this incentive to Dick's Sporting Goods, I think it would be a great asset. I do know that our community is in a shortage for sporting goods supply store, and so I feel that I am also going to vote in favor of the variance. I would vote in favor of this variance also.

RUANE: Any other comments?

FOSTER: Mr. Chairman, those last comments, in all do respect to Mr. Skelton, I don't think are BZA factors to be considered here. I don't think they are. I have never known a case that we have had that we make a determination that there is a need for a sporting goods store in town. I have never seen any case that we have ever had that has done that. That is not the issue here. I have no animosity to these people.

This is a BZA case of fairness, and no one else has gotten this thing. We have the Golf Discount Store is opposed to this and all he is saying is that he opposes it because other people don't have the same thing, and I see no reason to do this on the basis of that.

RUANE: See if particularly those of you up at this table can agree with me as I try to expedite this on its way. Bickley made an abbreviated motion to deny the variance based upon the Secretary's report and the statutory findings.

FOSTER: Last time.

RUANE: There are five of us here today eligible to vote it takes four of us to vote in one direction to take any definitive action. Two have expressed their opinions and have forecast that their votes are going to be in opposition to the motion that is on the table. Therefore, I think that pretty well tells us how much further time that we ought to spend on this today and what the likely outcome is to be. Which if things all play out the way I think they are going to be, we will all be back here a month from now to do this over again, because again, it will be a moot vote. Does that seem to be a fair assessment of this to you all?

I don't want to rush anybody's comments or cut anybody off from having a full and fair hearing on this matter, but if it is for sure that we are not going to reach a conclusion here today, then let's try to waste as little of the applicant's and as little of the public resource and our on resource as we possible can.

ROGERS: Just a brief comment, at last month's meeting, I agreed with staff to deny this variance, and for all the years that I have sat on this Board, I feel like this is going to open up a can of worms.

I also would like to see this fine sporting goods company come to Wichita. Before last month's meeting, I sat down and thought about from a marketing standpoint, this company, even if they didn't have a sign in front of their building, just the fact of what has been in there, I think most people in Wichita would know where that location is at. Therefore, that is part of my reasoning. I don't agree with the applicant that not having a huge sign would hurt their business. I feel like most people know the business that was in there prior, and that is from a marketing standpoint, something that you could really attach to. So I would vote to deny the request.

RUANE: Is that also a second of Bickley's motion to deny the variance with the information provided in the Secretary's Report.

ROGERS: Yes, that would be.

FOSTER moves ROGERS seconds that the Board accept the findings of fact set forth in the Secretary's report and that all five conditions set out in section 2.12.590(b) of the City Code as necessary for the granting of a variance have been found not to exist and that the variance be denied.

RUANE: We have a motion and a second. We have heard discussion. With your permission, I will call the question now.

MOTION to DENY VARIANCE 3-2-(1). ROGERS, RUANE, FOSTER in favor to DENY. PITTS, SKELTON opposed to DENY the variance. PHILLIPS abstained.

RUANE: Therefore this matter since we do not have any four votes in one direction, will automatically come back next month for the same show. Somebody has got to give one-way or the other.

PITTS: Mr. Chairman, may I address a remark to legal?

RUANE: Yes.

PITTS: I noticed in the amendments to our bylaws that something is mentioned in there about what we do on something like this. If we take up these bylaws today, and that is approved, would that affect this case?

DICKGRAFE: It would be my position that the application should be governed by the bylaws that were in affect when it was filed. I suppose if the applicant wanted to agree at the next meeting that it would be subject to those bylaws, that could happen so that this thing could move on. That it would either be denied, and they can appeal it, or that it would be granted, and they would appeal it.

The amended bylaws conclude that if there is not a majority vote of the members on the Board, which would be seven, then the applicant or the application would fail. So given the new bylaws there might be the possibility that there would be a resolution of this issue.

RUANE: Does that answer your questions?

PITTS: More or less.

RUANE: It really gives the applicant, if you want to opt in to these new bylaws, assuming that we approve them here today. We are trying to make sure that what is happening to you never happens to anybody else, where you get stuck in this never, never land. But it is not fair that they don't apply to you because they weren't the rules when you started off. But if you want them to apply to you, talk to Sharon or another member of staff, and we can explain to you how this scenario would work. Maybe get some of the folks from Dick's on the phone and explain to them what their options might be as well.

ABLAH: I have know idea, but I will talk with you Sharon, if that is appropriate, because I have to talk to the clients to see ultimately what they want. My question to you and to everyone in this room is can't I sit down, because I am tempted to say somebody has got to flip, either somebody comes our way or somebody doesn't, and if people don't want to do that, and I don't know what the right way to do that is. But, do I have the right to speak to each one of you one on one? Yes or no? I guess I would ask Dale?

DICKGRAFE: No.

ABLAH: I don't have the right to speak to the member one on one?

DICKGRAFE: No, this is a quasi-judicial board, and because of the open meetings requirements and the nature of this Board, that you have the right to appeal any decision, all of your comments need to be made to the Board. In fact, one of the recommendations of this Board regarding the bylaws that we are going to take up next is that it included in our bylaws that members won't speak to applicant's in an ex-parte type of situation.

ABLAH: That is what I understood before, and that is why I had to ask. I just encourage whatever kind of healthy discussion we can have about height the next time because I will be back, and I will be back again, and I will be back again. I hope, but I will let the applicant decide that.

RUANE: We are particularly handicapped there in that it is assumed that we will make a decision, and if you don't like it you will appeal it across the street. But in your particular case, the decision just keeps being postponed, and so there is not an appealable order for you to take issue with.

ABLAH: I guess the other question that I would have is, is there, and I am not trying to put Randy on the spot, but the conflict was from drawings that he did. I don't know how many drawings he did, but he can answer that question from what he did. Is he, and I heard the discussion earlier, but if you got seven then you are guaranteed to figure out how you get four, I suppose. Is that a option?

DICKGRAFE: The decision regarding the conflict needs to be made by the Board member. Certainly my advice would be, and we did this tongue in cheek, but if he viewed that he had a conflict when this case was filed, I don't know what could have changed. But the decision as to whether or not a Board member believes they have a conflict, that is their decision, and it is their duty or responsibility to ask the Chair to be recused from voting, and Randy did that.

SKELTON: I was just wanting to ask Sharon if there is no restriction on written communication or is this just verbal?

DICKGRAFE: The new bylaws, and those are proposals, and we are going to talk about those next would, ask that any of those kinds of communications be brought forward by the member who received them as well as the applicant being told that those types of communications need to go through staff. The reasoning for that is that if this case is ever appealed, we have to show that your decision was made on the record. Based on the record that was presented to the Board. It doesn't make sense that an applicant could give, in theory, three of you items, not give three of you other items, and then you don't have a fully complete record for the purposes of appeal.

TAPE CHANGE

RUANE: I would encourage you to talk to them again to see if they can make any concession at all. I know you have but go back to them again, maybe that would be just a matter of inches that could get this done.

ABLAH: If we were, is that something that can be decided at that meeting? Are you suggesting that there is negotiating amongst a group to make a determination in that?

FOSTER: Mr. Chairman, I am really bothered by this. You hear the word "negotiation". We are not here to negotiate. We are a quasi-judicial board. I have worked in cities where they set in robes to hear these cases.

RUANE: Bickley, I am going to cut you off.

FOSTER: I am offended by it.

RUANE: He used the word "negotiation" in response to a question that I asked him, and if you have fury over that direct, it at me. We are a quasi-judicial. Clearly we are at logger-heads here. Nobody is getting what they want. All anybody is getting is frustrated. All of us are going to have to re-exam our priorities and where we stand on this, and I ask that the applicant do the same thing. That does not encourage anybody to use any particularly words, but we can be at a standstill from now until a year from now if we chose, but that is not going to do anything for us, Rock Road, this site or anybody. So I encourage everybody to re-think what their priorities are and what might be some potential solution. Because the process is not serving anybody well for us to continue to spend every meeting on the same item. That is all I meant, and I should have made that clear.

ABLAH: Saying something inaudible away from microphone.

RUANE: That is welcomed and encouraged.

FOSTER: Do you need a motion to continue you this Mr. Chairman, or does it automatically come back?

DICKGRAFE: I think by the bylaws it automatically comes back.

RUANE: Thank you for your patience.

ABLAH: Thank you.

RUANE: Going now to Item #3 review and approval of the BZA2002 yearly calendar. That has been submitted in your advance packet as well. Anybody have any comments, concerns or modifications they would request to our calendar? Hearing no comments at all I guess that we will have the minutes reflect that it was adopted by acclamation.

Item #4 on our Agenda, case number DR2001-08 BZA Bylaw Amendments. Who would be our best presenter with regard to Item #4? Sharon would you feel comfortable? I think you should assume that we have all read these.

DICKGRAFE: I think primarily the substantive changes are that the Bylaws clarify some issues regarding the conflicts of interests and the effect of declaring a conflict of interests as well as the steps that need to be taken by a member. That is in Article II, Section E that it is up to the Board member to note that he does have a conflict. It is up to that member to ask the Chair that he be allowed to abstain and that they would not participate in any kind of discussions. If that permission is not granted or that request is not made and that member then just determines that they do not want to vote for that, I think it is important for the Board to note that silence would be counted as an affirmative vote.

The other issues are the ex-parte communications, which we have included that noting that this is a quasi-judicial Board and that is in Section H, Article II. That places a duty or responsibility on the Board members to make staff aware of any type of communications, allow staff to make the applicant clearly aware that is not appropriate and that those exparte communications, whether they are written or verbal, be made known to the Board as well as placed in the record.

The other substantive issue is the voting requirements to pass or have a final disposition of the application. That is in Article VII, Section C. That requires a little more than a majority of the Board members present. Staff and I discussed this issue and that there were a number of ways to approach it. Staff's position was that the granting of a variance because you are essentially granting an amendment of either the Sign Code or the Zoning Code should be held to a somewhat higher standard. That there ought to be more than a simple majority

required of the members present. Given that the current reading is that you have to have a majority of those appointed and qualified, which would deal with the issue of if you only have 6 members. If there is a vacancy in the Board, what number would be required. If there is not an affirmative vote of that number, then it fails or the variance is denied.

So under the current situation, if the last case came back under these rules, it would be denied, which would at least give the applicant the opportunity to appeal their case.

I think those are the substantive issues. I don't know whether Scott had anything else that he wanted to argue. A lot of the changes are clean-ups. We don't do Conditional Uses anymore, and we have added some language to deal specifically with some of the appeal issues and problems that we have had in the past dealing with the Superintendent of Central Inspection and those kind of interpretation issues.

RUANE: Any comments?

SKELTON: Sharon, some of us sit on District Advisory Boards (D.A.B.s), and how does this relate to if we are in the room and a BZA case comes up before the Board for a public comment by the Board? I mean what should be the action of the BZA member if he or she is on a District Advisory Board?

DICKGRAFE: District Advisory Boards are not to be hearing zoning cases, and my understanding the ordinances involving the D.A.B.s are going to be cleaned up to make sure that is clear. This particular case was presented to the D.A.B. against legal advice, quite frankly, and that was how it got there. We have tried to make sure, and I think the D.A.B.s recommendations actually got to you from the applicant not through staff, if I am recalling the facts of this right.

I think you, as a member, could certainly abstain from voting in the D.A.B. hearing if it comes there. I guess my hope would be that we'll get that cleaned up from an ordinance standpoint dealing with D.A.B.s, so we will not have this issue again.

SKELTON: Sometimes you have a room full of people, and they will force it on you, and there is nothing you can do about. As far as a Chair of a District Advisory Board, and inadvertently, you might have to raise your hand and run out the room with a conflict of interest. Would that be appropriate?

DICKGRAFE: I think you could certainly hear that and participate in that; however, you, as a member of this Board, would need to either abstain or relay any of that information, that would affect your decision in hearing a case. It is not

that you can't hear other information it is just that the record needs to be clear and all of the other Board members need to be apprised of what it is that you know, or what it is that you have heard.

Frankly, that is a concern that I have had as to having members of this Board serve on D.A.B.s because you run into that problem. I think initially the ordinance was that you could not. It was amended, because there were not enough qualified people to serve on those Boards, so they loosened that up is my understanding.

RUANE: I just have one correction item. I think looking on page 8, Letter E, in the fifth line down. I think it reads from left to right, request recognition by raising his or her hand. Other than that I commend your efforts in putting these together, and I think it will make our operation smoother in the future.

PITTS: I would like to, Mr. Chairman, just on our Exceptions, and Conditional Usages that we don't do anymore, ask a question. How did someone else assume that responsibility and the item was still in our constitution and bylaws? How is the legality of that ramifications?

MILLER: They were Use Exceptions when they were heard by the BZA. Then when the Zoning Code was amended in 1996, all the Use Exceptions were converted to Conditional Uses and incorporated into the Zoning Code. So we don't have Use Exceptions anymore in the Zoning Code, and so basically this group's responsibility is to interpret how the Zoning Code is supposed to be administered by changing that. There is no Use Exceptions to be reviewed, and they are now Conditional Uses and handled by a different body.

PITTS: That is very good. That is the best explanation that I have had so far.

FOSTER: They just changed the name. The Metropolitan Planning Commission did. Mr. Chairman, I have to admit to you my failings. Each time that I wanted to get with Sharon and talk about it, as I had talked about before, to go over the bylaws, it was announced that we were not going to have a meeting. I think I can document that if anybody wants that. So I did not prepare each time knowing that there would never be a meeting to do this, so I had not planned to do this in the last few meetings because we were not going to meet. But, secondly, I have been working all through the last holiday season, and I have not had time to look this over. I was looking it over here, and I would ask this question. Does the word "quasi-judicial" appear in here to identify the action or the way the Board operates, Sharon?

DICKGRAFE: No, and it would be my suggestion that not be placed in the Bylaws. That is all provided by in the Kansas Statutes. My concern when you

start putting in references to Statutes that those are amended and then our Bylaws would be in conflict with the Statutes. I think you are asking for more problems in the future than you would gain from adding those types of language(s).

FOSTER: With all do respect, I think you will find that the word “quasi-judicial” does not appear in the Statutes on this either. I think we are talking about court cases and other things, but if we operate that way shouldn’t, we be told that? Should that be our operative rule here, so to speak? That is why we have no ex-parte discussion. That is why we operate to have fair and impartial hearings and things like that. It seems to me that it sets the premise for Bylaws is to know how we operate.

When it talks about a closed session. That is actually in the State Statute that we can have a closed session and that might be mentioned. I don’t have any other comments, Mr. Chairman. I have not had time to study it in the last few days since being sent this.

SKELTON: I was also somewhat unprepared, and did not have time to study this information as well as I liked to do. The fact that it was more of a surprise that we were having a meeting.

RUANE: Two have expressed an interest in tabling this item. I think I will translate that to this. Anybody else? I don’t know, Bickley, that the words “quasi-judicial” are magical. I think that is what we are whether we call ourselves that or not, and that has to do with the parties that deal before us ability to start with an appeal across the street if they don’t like our findings.

But, if you want to spend more time on this, and I know that you have expressed interest in this several times, I think it is appropriate that we table this Item. I think we had to meet in light of the Dick’s Sporting Goods application.

PITTS: Until the next meeting Mr. Chairman, is that your suggestion?

RUANE: Yes, my suggestion is that we table this until the next meeting. How does this fall back on what I had said to this applicant in giving them the choose to opt in under the new Bylaws?

DICKGRAFE: If they are not passed today, they can’t opt in. I don’t think you can pass Bylaws at the beginning of the meeting and say they are going to be in effect the remainder of the meeting.

RUANE: By the same token, could we adopt them at this meeting and then at the next meeting have a simple majority decide that Dick’s case, if the applicant wanted to?

DICKGRAFE: Actually it is not going to be a simple majority of the people there. It is going to be a majority of the Board which is still going to require four votes. The difference is that under the new Bylaws that would fair...

MILLER: At least we would have an answer.

DICKGRAFE: Yes, so at least we would have an answer.

MILLER: Now, I suppose theoretically the other option, and I don't know whether the other two Board members would feel comfortable. You could approve them as they are today, and then if there are things that we need to discuss, we could have or reconsider them more or less for just those items that you might want to bring up, if you thought there were gaps or something. Maybe that once you get through talking the next meeting, there won't be any changes. I don't know whether Bickley has specific changes in mind, but that would be another alternative.

PHILLIPS: I would like to see this tabled for the next meeting. I would like to take some time to look at this a little better. Because, frankly, when you have a tie vote and that causes it to fail. I think that is punitive. I don't think, or consider that to be a fair way to resolve it. I am not sure it is right or wrong, but I don't think that is fair aside from this case. I am just thinking about others in the past where you might have a simple, case but for some reason or other, I am not sure that is a right solution, so I would like to discuss it a little further.

DICKGRAFE: I agree with that. My first recommendation was you ought to have a majority of the members present. Because if you have a five panel vote and you have a 3-2 vote, under the revisions that is still going to fail because you don't have a majority of the entire Board. I am not sure that from a layperson that is going to make sense. So staff and I certainly had some discussion as to how you do those numbers, and I think it may make sense for you all to look at that and do some numbers. If you have 4, it is going to require 4, and if you don't get 4 it is going fail. To a layperson a vote 3-1, I should have been granted that variance, so if you play these numbers, this may not be the best solution either.

PHILLIPS: Again, I am not trying to argue one way or the other, I just think you get a failure and approval by default. I am not sure that is the right solution. Hopefully we could all think about it a little more.

RUANE: I am dispensing somewhat with ordinary protocol but lets consider this matter tabled since it is our only internal matter. I don't think we need the same formalities of a motion etc., but let's get some of these discussion items out so people can be thinking of them.

I think the point that one way or another you walk out of here with a decision is a good one. But I can see where one writing the Bylaws who shows up on a particular day's meeting to be outcome determinative. I think they are worded to try and neutralize the affect of somebody having a conflict, or getting sick or whatever happens on that particular day. What was it? A 3-2 vote today? Yet that meant nothing.

FOSTER: I was picking up on Mr. Phillip's point in the State Statue on rezoning cases. Dale if you recall a 3-3 or a tie vote is declared to be as a disapproval.

PHILLIPS: I am sure that was based on a precedent. I just don't think it is totally a fair thing. I may not agree with those Bylaws either. That is just my comment.

FOSTER: I am not trying to delay this at all, but I have worked the entire holiday.

PHILLIPS: I agree, and I think we should discuss it at greater depth at the next meeting.

RUANE: Does it look as if we will have Items for December?

KNEBEL: You will have five Items if you table it.

PHILLIPS: Where are we in this meeting? Is the meeting adjourned?

RUANE: We are still considering how and when we table the Bylaw Amendments. We are still on Item #4.

KNEBEL: There are 3 new applications: 2 variances, 1 appeal, and then Dick's Sporting Goods for the 18th.

RUANE: Okay, anything more on Item #4, the BZA Bylaw Amendments?

DICKGRAFE: You want those tabled to December or January?

PHILLIPS: If you got that many cases, you might want to table until January where we have more time unless it is critical with staff's schedule.

FOSTER moves ROGERS seconds to table the BZA Bylaw Amendment until January 2002.

MOTION CARRIES 6-0.

RUANE: Now, we are to Item #5. I will still make sure I reserve time for your comments Randy, or were your comments on the Bylaws? J.R. Cox do you have anything to report?

COX: I will not hold up the adjournment of the meeting. I have no report at this time.

PHILLIPS: For those who have not been on the Board long enough, I want to respond to Bickley's comments about "negotiation". It has been in the past where we have actually, if you want to use the word "negotiate", or we have "worked with" the client to find a suitable solution. We have compromised. Whatever you want to call it.

I can think of two cases where we reduced the height, or we amended the request, in the process of the meeting in order to find a solution. Because I think it was a case that had been like this one, it was presented more than once. I can think of two, and almost three, in my time on the Board. I think actually along Rock Road there was a sign amendment, and it may have been before Dale and Scott got on here, and that was the Wichita Suites or the Wichita Inns. I am not sure if that was height or if it was just the size of the sign on the side of the building further north, north of K-96.

RUANE: Northrock Suites?

PHILLIPS: I think it was Northrock Suites, something up there. Just for the record, I think that was something that was mentioned that there hadn't been any sort of case like this, but I believe there was something up there, maybe 1996 or 1997.

RUANE: The concept of amending and reaching a solution are one of the factors that makes this a quasi-judicial body as opposed to just an administrative body.

FOSTER: What I was offended about is the use of the word "negotiation". That is different than what I think Mr. Phillips is talking about. Mr. Phillips is talking about, as I see it, seeking a solution to a problem. We are not here to negotiate with an applicant, so to speak. That was my opinion. But also the idea that he would call all the members, that he would call 6 out of the 11 members of the D.A.B., that he seemed offended that he was not able to do that here and so forth.

PHILLIPS: I am not arguing any of that Bickley. I just wanted to make it a point that we have in the past, and you can call it what you want, you can split hairs and define it any way you want. We have worked with applicants, and I think that what I heard from the audience, and I was not sitting as a Board

member, what I heard was he said "Can we find a point to agree on, and negotiate". Maybe he chose it improperly, and you are right to respond that way.

I just wanted to point that out that it has been in the past we have worked with, and I think negotiation is finding a solution. I mean we have an attorney on the Board that can give us a better definition. But you are entitled to your opinion Bickley, but I don't think that was his intent to try an insult anybody. I think most applicants come here with just the opposite, just some comments.

RUANE: Any other comments? We stand at adjournment.

ADJOURNMENT 4:10 P.M.